No. 20,108

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AARON NEWMAN, DANIEL NEWMAN, PAUL NEWMAN AND CARL NEWMAN, A PARTNERSHIP d/b/a COLONY FURNITURE COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent argues that the Board violated the hearsay rule by admitting into evidence union representative Taylor's testimony about a Taylor conversation with Federal Conciliator Medoff. But the argument lacks merit: the remarks attributed by Taylor to Medoff were considered only for a limited purpose and not to show the truth of their contents.

Thus, Taylor was reluctant to meet with Aaron Newman, as requested, after terms had been concluded with Daniel. But Taylor consented to the meeting, after expressing unwillingness to engage in any further negotiation, when Conciliator Medoff assured him that there would be no such problem because Daniel had agreed to sign the contract if Aaron did not. To this day, respondent argues that there was no contract at this point and, to buttress its argument, contends that even Taylor did not believe there was a firm agreement (Br. 19-20). The Board's reliance upon the Taylor-Medoff conversation was obviously proper, therefore, to show that Taylor's subsequent meeting with Aaron was *not* inconsistent with Taylor's belief that a contract had already been reached. With reference to the issue of why Taylor met with Aaron Newman, the truth of Medoff's statement is not an issue and the Board therefore could properly consider Taylor's testimonial account of that statement.[1] McCormick, *Evidence*, § 226 (1954).

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[1] With reference to the issue of whether Daniel had actually promised to sign the agreement, there was sufficient evidence in the record for the Board's finding, without reference to the Medoff remark. See our opening brief, pp. 6-8. Respondent does not impair the validity of this finding by showing that Taylor waited for an indication of assent from the Company before submitting the drafted agreement to the Union for ratification. The existence of a contract was mutually acknowledged at the May 18 meeting and the Union then undertook the task of preparing a formal integrated document. One need not assume that Taylor waited thereafter for Company approval because he feared the agreement was not binding. At this stage, Taylor simply did not know if the draft he prepared constituted an accurate embodiment of the agreement already reached. (Tr. 91-92).

2. Respondent now objects to enforcement of the Board's order on the ground that it may impair employee rights. Specifically, respondent notes that there are compulsory membership and dues checkoff provisions in the dishonored contract. According to respondent, enforcement of the Board's order will require "illegal consequences" (Br. 42) by subjecting current employees to the obligations retroactively and prospectively. This belated concern for the rights of employees is misplaced: in ordering respondent to execute its agreement with the Union, the Board did not adjudicate or effectively determine, adverse to such employees, any privileges which they may have acquired during the contract's hiatus.[2] See *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 339-341; and *N.L.R.B.* v. *Gene Hyde*, 339 F. 2d 568, 573 (C.A. 9). None of the contract terms here are unlawful on their face, nor does respondent show that its own compliance with the Board's order will necessarily impair employee rights. The rest is all speculation.

With respect to the problems of dues and checkoff that respondent anticipates, it is enough at this point to note that such problems need not arise; that the Board's processes are available to aggrieved employees if they do; and that the Company and the Union can, by their own lawful conduct in the future, prevent such problems from arising. "The order to bargain

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[2] Nor does the possibility that the Union may no longer have support of a majority of the current employees alter this case. *N.L.R.B.* v. *Holly-General Co.*, 305 F. 2d 670, 673-675 (C.A. 9), and cases cited.

means to do so within the prescribed limits of the law." *N.L.R.B.* v. *Andrew Jergens Company*, 175 F. 2d 130, 134 (C.A. 9), cert. den., 338 U.S. 827.

3. As shown in our opening brief, p. 8, the Board found violation of Section 8(a)(5) here not only because of respondent's refusal to execute the agreement reached on May 18, 1962, but also because of tactics used by respondent, between September 1961 and March 1962, evidencing bad faith in negotiations. This Board finding is challenged on two grounds. First, respondent contends that its repeated shifting of bargaining authority from one Company representative to another "was never put in issue or litigated" (Br. 24). The record refutes this contention. Thus, the General Counsel's complaint—even the portion quoted in respondent's brief, p. 24—shows that bad faith conduct of negotiations was expressly and separately alleged, in addition to the refusal to sign the agreement reached. Furthermore, respondent had ample opportunity to respond at the hearing when the evidence was adduced describing the conduct which tended to prove this violation. Whether as respondent states (Br. p. 26) the Regional Director may have disagreed with the Trial Examiner's view that this conduct was unlawful is immaterial since—as respondent concedes (*ibid.*)—the Examiner's findings were explicit and permitted exceptions to be taken to the Board. *The Frito Company Western Div.* v. *N.L.R.B.*, 330 F. 2d 458 (C.A. 9).

Second, respondent challenges this Board finding of bad faith by citing inappropriate cases. *Lloyd A.*

Fry Roofing Co. v. *N.L.R.B.*, 216 F. 2d 273, 276 (C.A. 9), *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 267 (C.A. 2), cert. den., 375 U.S. 834, and the like, merely hold that a company otherwise bargaining in good faith does not violate Section 8(a)(5) because it has not empowered its representative to *execute* a binding agreement. Here, the Board found a violation of Section 8(a)(5) because of a different and more fundamental problem: respondent failed, between September 1961 and March 1962, to make available an authorized *negotiator* for face-to-face bargaining.

4. Respondent's attack on the Board's remedial order rests upon three claims advanced in respondent's brief at pp. 29, *et seq.*: (1) the claim that the Board's original Order of November 1963 was clear and unambigious (2) the claim that the dishonored contract was for a one-year term, and (3) the claim that the Board's clarifying order of September 1964 was issued in disregard of procedural requirements. Since all three claims are demonstrably incorrect, respondent's attack must fail.

The first claim focuses upon the language used by the Board in its original order. Respondent contends that when it was ordered to "execute the agreement reached on May 18, 1962" this order necessarily contemplated that the terms of that agreement were to be applied for a period commencing with the actual date of execution. But the Union read this order to mean that the effective period of the contract should commence as of the time respondent should have signed

it.[3] There is no need now to labor the question of whose interpretation of the order was correct, for the Board itself has answered that question: the Union's interpretation was correct. Respondent does not and cannot challenge the Board's power to require such retroactive application of a repudiated contract.[4] Instead, respondent persists in its view that only prospective application was originally intended by the Board. We have already shown that this view is erroneous, as illustrated by the Board's reference to the *Warrensburg* case (143 NLRB 398, enf'd, 340 F. 2d 920 (C.A. 2)) in its original order. See our opening brief, p. 24. It is true, as respondent points out (Br. 33), that there were other legal issues in *Warrensburg*, to which the Board's reference might have been directed, such as the optional feature of the order whereby the Union might choose either the negotiated contract or further bargaining. But that merely goes to show that the Board was correct in concluding that explicit clarification of its original order would be appropriate; it cannot mean that the Board originally intended only a prospective application of the con-

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[3] Respondent concedes that the Union "stood fast" on its view of the proper date for commencing contract application (Br. 9, 40). Therefore, we need not discuss further respondent's objection to the fact that the Board took administrative notice of the existence of a dispute between the parties over interpretation of the Board's original order.

[4] See, e.g., *N.L.R.B.* v. *Gene Hyde*, 339 F. 2d 568, 571 (C.A. 9), where the Court explained that the purpose of a Board order in a case like this is "placing the parties, with reference to the contract, back in the position which they occupied prior to the breach."

tract, because the *Warrensburg* order itself required retroactive application.[5]

In short, the Board's original order did not expressly and unambiguously apprise the parties of the intended date for commencing application of the contract; the Board acknowledged this lapse; and a subsequent directive issued to make explicit what was only implicit before. Respondent's basic dispute with the propriety of such corrective action is that it had the effect of "imposing new and different obligations on respondent." This brings us directly to respondent's second claim, i.e., that it had only agreed to a contract for a one year period; for only if this claim is true can it be said that the Board's order imposes an obligation upon respondent any different from what it had actually agreed to. We concede, of

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[5] Respondent is clearly wrong in stating that the Board's "customary remedy" is to require the contract terms to become effective only upon actual execution of the contract. In cases where the Board has ordered execution of a contract, the period of effective duration of the contract is not a matter of "custom." Rather, the Board has shaped its orders in each such case so as to grant a fair, effective and meaningful remedy in light of all the circumstances. Such considerations as the original intentions of the parties regarding contract duration, the amount of time elapsed since the violation, and the interim conduct of the violator have properly been considered. Thus while *New England Die Casting Co.*, 116 NLRB 1, 5, set the effective date of the contract to commence upon actual execution, cases like *Sheet Metal Workers Union Local No. 65*, 120 NLRB 1678, 1679; *Operating Engineers Local Union No. 3*, 123 NLRB 922; and *Warrensburg*, 143 NLRB 398, 399 all required retroactive application of the contract terms.

course, that a Board order requiring application of a contract for a longer effective period than that agreed to by the parties would constitute an exercise of remedial authority requiring prior notice to the parties. We likewise agree with respondent (Br. 32) that such an order would be a departure from Board precedent. But we cannot agree that such an order is here involved.

Despite respondent's frequent references to the contract in this case as being for a one-year term (Br., pp. 30, 39, 41), this description is simply inaccurate: the parties themselves deliberately and undeniably left the terminal date of their agreement open, contemplating long-range prospective application absent notice of a contrary intent. Therefore, the Board's order does not contravene the parties' intention regarding the duration of contract application. Respondent's contrary assumption is analogous to the objection a tenant might raise under a typical lease agreement executed for a one-year period with a provision for automatic year-to-year renewal absent timely notice. Failing to supply timely notice, the tenant would be liable to pay rent for more than a one-year period; but he could hardly accuse the court of subjecting him to a "new and different"obligation.

What we have already said also disposes of respondent's third claim, *i.e.*, that the Board's clarifying order issued without procedural prerequisites. For we do not understand respondent to be contending that a true clarification by the Board requires prior notice; its position, rather, is that the order of

September 1964 was a "modification" and not a clarification. That argument, as we have just demonstrated, rests wholly upon the erroneous view that the contract, here was only for a one-year period. Once the contract is acknowledged to provide for automatic renewal, it becomes perfectly clear that it is the contract provision itself, and respondent's own continuing refusal to comply therewith, which results in the progressive extension of the effective period of the contract. It is only because respondent agreed to, and then refused to honor, an agreement with no fixed terminal date that the contract period and the consequent costs of compliance continue to mount. The Board's September 1964 order "modified" nothing.

Finally, respondent concedes that it agreed to a contract with an automatic renewal provision (Br. 37) but blames the Board for depriving it of the recurring opportunities to terminate the contract by timely notice. Again, this argument attributes to the Board's order consequences which flow from respondent's conduct. Each of the Board's orders preserves respondent's right to terminate at the next opportunity; respondent has never yet sought to exercise this privilege. When respondent seeks to excuse this inaction on the grounds that "there was no occasion for respondent to give notice . . . [because] a contract [had not yet] come into existence . . ." (Br. 38), it merely reveals that the whole attack on the Board's remedy is premised on the assumption that

there never was any unlawful repudiation of an agreement to begin with.

Respectfully submitted,

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October 1965.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and that in his opinion the tendered brief conforms to all requirements.

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